

IN THE COURT OF APPEALS DIVISION II FOR THE STATE OF
WASHINGTON

LIBBY HAINES-MARCHEL,
Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,
Respondent.

REPLY BRIEF OF APPELLANT
NO. 43700-7-II

LIBBY HAINES-MARCHEL
Pro Se

FILED
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DIVISION II
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I. INTRODUCTION

Mrs. Haines-Marchel appeals the June 15, 2012 order granting the Department of Corrections (DOC) motion for summary judgment in a Public Records Act lawsuit. Mrs. Haines-Marchel submits this reply brief to the respondent's response brief.

II. RE-COUNTER STATEMENT OF THE CASE

After Mrs. Haines-Marchel visited her husband Brock Marchel at Clallam Bay Corrections Center (CBCC), he was escorted from the visiting room and placed on a dry-cell watch based on information received from informants indicating Mrs. Haines-Marchel would be bringing narcotics into CBCC. CP 161-164; CP 118.

In the days after the search, in response to a prison grievance Brock Marchel filed, he was given a copy of DOC Form 05-392 with the inmates name(s) and DOC numbers redacted and within the contents the assessment and rating of the reliability of this information to show that it existed so they could place him on dry-cell watch. CP 116; CP 118-119.

While that took place, plaintiff filed a Public Disclosure Request on Dec. 28, 2010. The department sent Mrs. Haines-Marchel 43 pages of documents, along with an exemption log listing and explaining redaction made to the released documents. Among the released documents, pages 1

and 2 were redacted in “blanket fashion” leaving only the document title and identifying information. CP 125-126.

The redaction of these documents is the basis under which Mrs. Haines-Marchel has brought this action under the Public Records Act (PRA) seeking financial penalties.

III. ARGUMENT

A. The Trial Court Abused Its Discretion When It Did Not Review All Exhibits Before Deciding In Favor Of The Defendants Cross Motion And Denying Plaintiff’s Motion For Summary Judgment

The respondents make numerous claims in their response which are not supported by the record in this case. However, the plaintiff concedes that the trial court did in fact review some of the exhibits attached to plaintiff’s motion but not ‘all’ of them. The plaintiff is not trained in the field of law nor has ever litigated a case in court under the PRA nor appealed any court action.

When the plaintiff received the Letter Opinion from the judge, in which he stated: “the court had not, however, reviewed the various exhibits attached to some of those pleadings. The court reviewed the electronic version of the court file and that version did not, for whatever reason(s), contain the exhibits”. CP 229.

The fact that the judge reviewed some of the exhibits does not change the fact that all evidence was not considered according to the “Letter Opinion”. The judge did state, and based his opinion on William Paul’s declaration, but did not reference any of the other evidence and exhibits provided by the plaintiff.

Now, the order proposed and submitted by the defendants and signed by the judge on June 14, 2012 states, “The plaintiff’s declaration, Michael Kahrs declaration, and Brock Marchel’s affidavit was reviewed. However, there is no mention of any of this or other exhibits thereto attached being reviewed in the Letter Opinion”.

The trial court further stated in its Letter Opinion that “The court will sign and Order ‘commensurate’ with this ruling upon presentation”.

The Order presented by the Attorney General is not commensurate with what the judge’s Opinion Letter sets out.

First there is no mention in the judges Letter Opinion nor in the verbatim transcripts that the court reviewed anything but the two forms in question. Nothing states that plaintiff’s declaration, or other exhibits were reviewed. However, the proposed Order signed is contradictory to what the court actually reviewed.

The plaintiff in its Assignments of Error and Issues pertaining to those errors clearly states that the judge did not review all the evidence

and exhibits in this case and therefore his decision was an abuse of discretion. The plaintiff has never contended nothing was reviewed. (*See* Plaintiff's Opening Brief Pg. 5-10 and CP 229).

The defendants argue in their response that the judge did review all the exhibits offered. They base this assertion on the RP at 6-11 and RP at 44 and the final Order proposed by the defendants and signed by the judge. Beginning with RP at 6-11 the judge is referring to the form in question that was withheld from the plaintiff, not about any other exhibits, affidavits or other forms submitted as evidence listed at pg. 12 of plaintiff's opening brief. The plaintiff has never claimed the judge didn't discuss them. Rather, defendants are under the false assumption that because the judge reviewed these two forms, he reviewed the entire record and other evidence in this case. He did not.

Moving now to RP at 44. The defendants attempt is to substantiate their argument by the judge stating he would look at these exhibits "with a keen eye". This statement must be taken in context as to specifically what the judge was referring to. The court beginning at line 8 pg. 44, is specifically taking about the forms withheld, this is why the judge first felt an in-camera hearing would be needed to protect the names of the people on the form.

Those forms were not in the file as the judge stated, and this is clearly pointed out on pg. 45, lines 2-19 of the RP. For the defendants to attempt to use these discussions of 2 documents to support their claim is an enormous reach to say the least. And the argument must fail.

Finally, the defendants refer to their proposed Order signed by the judge to show all the exhibits were reviewed.

Once again, the plaintiff would direct the court to the Letter Opinion wherein the judge does not state anywhere he reviewed anything other than William Paul's declaration and where the judge clearly instructed, "The court will sign and Order commensurate with this ruling upon presentation". However, the proposed Order by the Attorney General was not commensurate with the ruling set out in the Letter Opinion. CP 229-231.

The Plaintiff has shown the trial court 'abused its discretion' and the court should reverse the trial court's decision.

B. The Plaintiff Has Argued Her Assignment Of Error As To The Trial Courts Holding That DOC Form 05-392 Is Exempt From Disclosure Pursuant To RCW 42.56.240(2).

The respondent's argument that the plaintiff has failed to argue that the release of DOC Form 05-392 would reveal the identity of the informants and would endanger the life and safety of these individual is unsubstantiated.

The plaintiff has argued this error clearly. She stated, “she pursues these public disclosable documents unredacted with the exception of the informant’s names(s) and identifying DOC numbers”. *See* Plaintiff’s Opening Brief pg. 19.

The plaintiff further stated on pg. 25 of her Opening Brief that the form “provides no particularized information to identify informants, part of the front page have areas which if filled in with specific details would possible have information which is sensitive”.

The plaintiff clearly state at pg. 25 of Opening Brief the following in support of her argument “Mr. Paul, however did not even provide information on motive, or make any comments. Only three boxes were checked and the one section filled in with some information had the inmates numbers redacted”.

Plaintiff’s argument continues and she states: “The department is fully capable of minimal redaction necessary to protect the identity and safety of the informant on Form 05-392 provided to Brock Marchel. *See* CP 118-119. *Also See* ‘Appendix A’ listed as “dry-cell search authorization” DOC Form 21-408 which is offered inmates when placed on dry-cell search”. This form clearly states the reason for placement. “Suspicion of introduction into CBCC via visiting room program and that

his placement is based on “confidential information”.¹ (See Appellant’s Opening Brief pg. 25 where plaintiff quotes *PAWS*, supra, 125 Wn. 2d at 261; and *Sargent v. Seattle Police Dept.*, 167 Wn. App. 1, 260 P.3d 1006 (2011)).

And finally on pg. 25 the plaintiff states, “The questions thus turns upon the adequacy of DOC’s showing whether the exception applies in this particular case against the plaintiff. *Id.* at 1014. Mrs. Haines-Marchel, does not dispute namely, an inmate informants identity information is not subject to disclosure. But only the blanket redaction that allegedly revealed the reasons of DOC’s assessments and decisions based on those unsubstantiated allegations they found creditable against plaintiff”.

All of the above support plaintiff’s argument, that she did in fact argue her Assignment of Error as to the trial courts holding that DOC Form 05-392 is exempt. She admits this may not have been done to the standard of a trained professional attorney who is a member of the bar. But it was briefed to the best of her ability as a lawyer. The respondents cite *Draszt v. Naccarato*, 146 Wn. App. 536, 192 P.3d 921 (2008), which states “The Appellate Courts generally will not decide an issue if the appellant

¹ Plaintiff mistakenly confused Form DOC 05-392 with Form DOC 21-408 which is authorized to be given to inmates per policy 420.311(b). This attachment is part of the documents she received in her public disclosure request. However, DOC Form 05-392 does provide reasons for the placement to some extent as well.

does not support her does not support her argument with citation to authority”.

Plaintiff’s understanding of *Draszt*, is not that this court cannot or will not decide this issue in the event that she has not properly briefed this issue, but generally it will not. She ask this court in the interest of justice to consider she is pro se.

In the *Draszt* case the court concluded that *Naccaratos* did not waive her claim. They based this on the fact that the *Naccaratos* continuously asserted an interest in the disputed property. Here Mrs. Haines-Marchel has done the same in her Opening Brief pg. 25 and she has quoted *Sargent v. Seattle Police Dept.*, 167 Wn. App1, 260 P.3d 1006 (2011).

She has continuously maintained that the documents in question should be released with names and inmate DOC numbers and other identifying information redacted because these documents are not exempt pursuant to 42.56.240(1) and (2).

Plaintiff has never abandoned this issue and the defendant’s argument must fail.

C. Public Records Act Cases May Be Decided On Affidavits And Appellate Review Is *De Novo*

This court reviews summary judgment *de novo*. The court may review all documentation, affidavits, declarations, and other evidence. The Appellate court stands in the shoes of the trial court. *Progressive Animal Welfare Society (PAWS) v. University of Washington*, 125 Wn.2d 243, 884 P. 2d 592 (1994).

The Appellant through affidavits and the attached documents in support of her motion has showed that the entire redaction of the documents DOC withheld was beyond the scope of the exemptions claimed. In reviewing the entire form it's clear that DOC's conduct is unreasonable, and judgment for the defendants was improper and should be reversed.

D. The Trial Court Incorrectly Concluded That Both Pages Of DOC Form 05-392 are Exempt From Disclosure Pursuant To RCW 42.56.240 (1) And (2)

The defendant's position that the entire redaction of the 2 pages was appropriate is not consistent with the law regarding PRA. *PAWS*, at 125 Wn.2d 261.

In *PAWS*, the court stated: "In general, the Public Records Act does not allow withholding of records in their entirety. Instead, agencies must parse individual records and must withhold only those portions which come under a specific exemption. Portions of records which do not come under a specific exemption must be disclosed.

DOC has not showed that the entire redaction, and withholding of the record fall under the exemption 42.56.240 (1) and (2). As the plaintiff has stated, she is not requesting the entire document without any redactions, in fact she agrees with DOC that the names and DOC numbers of the inmates who provided this false and unreliable information accusing her of a crime should be withheld to protect their privacy and Safety. However, to redact other portions which don't is a violation of the PRA.

The contentions made by William Paul's affidavit which the trial court based its decision on, "Is supposed to set forth such facts as would be admissible in evidence. CR 45(e). Allegations, arguments and speculations do not raise issues of material fact that would preclude summary judgment". *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d (1986).

How is it that the trial court can consider the plaintiff to be an inmate under the jurisdiction of DOC? Secondly, what factual basis exist that plaintiff could deduce the identities of the informants with all the proper redactions? Mr. Paul's affidavit furthermore "speculates" that the document in question shouldn't be in the hands of the public. CP 161-164. Essentially, the Department of Corrections wants a "free run" to do as they please without having accountability.

To allow the Department of Corrections the ability of the interpretation and enforcement of the PRA's requirements to the very agencies it was designed to regulate is the "most direct" "coarse to [the PRA's] devitalization". *Hearst Corp v. Hoppe*, 90 Wn.2d 123, 131, 580 P.2d 246 (1978).

E. RCW 42.56.240(1) Does Not Exempt The Entire Contents Of DOC Form 05-392 From Production

The appellant is not attempting to have DOC release all the information in DOC Form 05-392 as previously stated, only the portions that are not exempt. Investigative records should not be released unless the investigation is completed and finalized. The defendants from their brief, state that the plaintiff was never under investigation or accused of any criminal activity according to the defendant brief.²

The plaintiff argues that once that accusation was determined to be false after DOC's investigation, the documents in question should be partially released to her, because the investigation was completed.

Newman v. King County, 133 Wn.2d 565, 947 P.2d 712 (1997).

This is the point the Supreme Court made in *Cowles v. Pub. Co. v. Spokane Police Dept., City of Spokane*, 139 Wn.2d 472, 987 P.2d 620

² The plaintiff contends that this assertion by the defendants is at very least disingenuous and an attempt by them to intentionally mislead the court. The plaintiff would direct the court to. William Paul's declaration CP 162 pg. 2 line 13-14 and more specifically CP 118.

(1997). Therefore, the exemption of RCW 42.56.240 (1) for specific intelligence or investigative information does not apply, subject to the appropriate redactions from other statutorily enumerated exemptions.

The most telling aspect why the trial court's decision was incorrect as well as the States contention that DOC Form 05-392 is exempt pursuant to RCW 42.56.240 (1) and (2) can be found simply reviewing the narrative of what information was given by the inmates that lied. "I/m Marchel, B. 788197 was to be introducing narcotics to CBCC through visitor Libby Haines, during visit". This same information was released to Ms. Haines and Mr. Marchel in DOC Form 21-408 Dry Cell Search Authorization which is allowed per policy. If that information is disclosable in one Form, DOC shouldn't be allowed to withhold it in Form DOC 05-392. *See* Appendix A.

This clearly shows that the total redaction of these documents was excessive, and the Trial court's ruling should be reversed.

The Department of Corrections cannot use the RCW 42.56.240(1) and (2) exemption as a broad brush to simply deny the citizens the right to public disclosure of its records. DOC, as every other government agency must be held accountable to its citizens. If they are allowed to circumvent the basic tenets of the PRA by claiming an exemption which only applies

partially (i.e. redactions of inmate names and numbers) as a overbroad reaching attempt to avoid accountability, undermines the PRA.

The defendants ask this court to reach the conclusion that Form DOC 05-392 is not subject to disclosure ever. CP 199-212. This contention is based on the New Letter sent to DOC staff regarding release of 05-392. The letter does not state total redaction of document 05-392, but rather the same minimal redactions the plaintiff requested be made before releasing the form.

It is clear from the form itself which was totally withheld “DOC Form 05-392” that the form is disclosable. At the bottom of the form it states:, “The contents of this document may be eligible for public disclosure”.

The appellant has shown that the failure to disclose the partially redacted documents violated the PRA and the Trial Courts decision was incorrect and should be reversed by this Honorable Court.

F. Mrs. Haines-Marchel Does Have A “Legitimate Public Interest” In Access to DOC Form 05-392

The defendants state in their Response Brief at pg. 18, that Plaintiff has no particular strong interest in Form 05.392. Mrs. Haines-Marchel believes she does for numerous reasons.

1. When inmates give false information accusing a citizen of committing a crime of bringing narcotics into a prison facility, she surely has a Legitimate Public Interest in the nature of the allegation and how DOC responds and investigates an allegation made when those allegations are proven false. To accept the defendant's argument would be the equivalence of allowing government agencies to do as they please without being held accountable for these actions.

2. In this case the Lead Investigator William Paul who's declaration the Trial Court based its decision on, further demonstrates the need for accountability to the public. William Paul in his declaration states DOC Policy requires a "Confidential Informant Form 05-392" for each separate informant to determine their credibility. However he only used 1 form in this case and combined the information of all 3 Informants. *See* CP 161-164.

This clearly leads to the questions; how did Mr. Paul get an accurate Reliability Score if each informant's information wasn't independently evaluated, but rather assessed collectively.

It is precisely because of instances as the one described above, why RCW 42.56 states: "The purpose of the Public Records Act is to preserve 'The most central tenets of Representative Government namely, the sovereignty of the people and accountability to the people of the public

officials and institutions serve”. *O’Conner v. Dept. of Social and Health Services*, 143 Wn.2d 895, 25 P.3d 426 (2001) (quoting *PAWS* 125 Wn.2d at 251).

The defendant states at pg. 18 of their Response Brief that “There is nothing in the record to indicate that Mrs. Haines-Marchel herself was ever investigated or charged with, or directly accused of anything”.

As stated prior in this Reply, that is not factually true. It clearly states on Form 05-392 that the information given by the informant said “Inmate Marchel, B. #788197 was to be introducing narcotics to CBCC through visitor Libby Haines during visit”. CP 118-119.

Without accountability to the public these lies made against a Public citizen would never be known, and convicted felons could falsify information as they so often do, as pointed out by the defendants in their Brief at pg. 14, without DOC being accountable. The plaintiff agrees that DOC should hold inmates accountable and the Public Record’s Act should hold DOC accountable as stated in the Statute.

G. Mrs. Haines-Marchel Regarding *Livingston v. Cedeno* Is Not Misplaced

The DOC has a mailroom Policy which prevents certain items from entering the institution. Items which they deem are a threat to the security of the facility. This includes items released pursuant to PRA.

The defendants continuously state that the documents denied to the plaintiff in the hands of inmates would be a threat to the process they use to evaluate inmate informant information.

Again, the plaintiff is not an inmate and secondly has no need to manipulate DOC officials through false information provided to them as did the inmates in this case.

For the defendants to make the suggestion that the plaintiff has any desire to put Form 05-392 into the hands of a prisoner is unsupported by anything in the record before the court.

The plaintiff in pointing out *Livingston v. Cedeno*, 164 Wn.2d 46, 49-50, 186 P.3d 1055 (2008), was simply to let the court know that DOD has policies and a system in place to prevent documents acquired through the PRA from entering the institution if they present a security threat. *See* CP 120.

The plaintiff has not claimed that the DOC prison mail room screening is not independent of the PRA, as the defendants claim or that the decision in *Fisher*, 160 Wn. App at 722, has an effect on DOC's ability to claim an exemption.

H. The Redactions Made Are Overbearing And To Redact The Entire Form Violated The PRA

The defendants claim that the only way to ensure that effective laws enforcement as well as specific intelligence information is not disclosed to inmates by releasing Form 05-392 is a total redaction and withholding of the document. This is not accurate, nor in compliance with the PRA and its supporting case law, nor the legislatures intent when enacting RCW 42.56.

The plaintiff respectfully ask this court consider the following information on Form 05-392 in determining if in fact it would compromise intelligence evaluation methods, and prevent investigators from being able to objectively evaluate confidential information as William Paul states in his declaration and the defendants claim.

The form in question CP 118-119 has information which cannot be interpreted as justifying 42.56.240 (1) and (2) exemption for instance;

1. Information / violation / crime – Introduction of narcotics.
2. Marchel, Brock / 788197 – a box check – marked suspect.
3. The following questions asked on the form, some without the answers.
 - a). Is informants information first hand?
 - b). Why-did the informant come forward with the information?
 - c). Does informant have anything to gain by disclosing this information?

- d). Has previous information provided by this informant proven reliable?
- e). Infraction Written ☐ Yes ☐ No WAC# _____
Infraction Hearing Results ☐ Guilty Not Guilty ☐
- f). Signature of Reporting Staff and Date

On CP 119, if the defendants were to redact the numbers under each box referring to “SOURCE RELIABILITY”, MOTIVE, HISTORY OF COOPERATION, PAST AVERAGE ACCURACY and on the “CONTENT VALIDITY” section that would not reveal intelligence information or prevent effective law enforcement.

The total redaction compared to the explained set forth above its clear that the document could’ve been released with redaction pertaining to all staff comments by investigators and the evaluation numbers regarding those comments.

The computation section scale does not expose information that would affect or assist a Public Citizen in manipulation of information give to DOC officials as to whether or not an inmate could use it, the defendants cannot speculate because the documents requested are not being disclosed to an inmate.

For the defendant to suggest that is by implying what I may reveal in the hands of a prison is asking this court to rule in their favor as if plaintiff is a convicted felon confined in a correctional facility.

DOC's failure to minimally redact violates the Public Records Act. *PAWS*, 125 Wn.2d at 261.

There exist questions of genuine material fact in this case. *Building Industry Association of Washington v. McCarthy*, 152 Wash. App. 720, 218 P.3d 196 (Div. 2 2009). Mr. William Paul's declaration is a broad speculation against the plaintiff and not specific to the release of Form 05-392 with the proper redactions.

It is clear that the assertions on Denise Vaughn's declaration that DOC Form 05-392 should be totally redacted per policy is not factually accurate and consistent with New Letter sent out on August 24, 2010 regarding confidential informants' information. CP 199-212.

The News Letter states, "Handwritten statements by CI and DOC Form 05-392 Confidential Information Report should be withheld completely" and to "make sure to redact only that information which would identify the confidential informant".

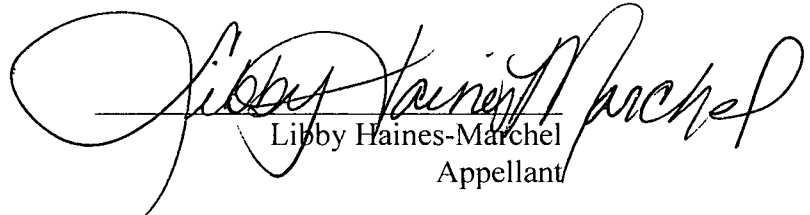
A blanket redaction is simply unjustified by the exemptions claimed by the defendant. There is no signature to this news brief 06-08 by the Secretary of the Department of Corrections. CP 199-212 and CP 105.

Material facts in question exist, and those bald assertions are speculated do exist in Denise Vaughn's and William Paul's declaration and should not be considered as factual. *MGM* 106 Wn.2d at 13.

IV. CONCLUSION

Plaintiff, has shown disputed facts exist in William Paul's declaration and has met the initial burden of showing the absence of an issue of material facts. This court should rule in favor for her and reverse the Trial Courts decision where they granted summary judgment for the defendant. The PRA is the lifeline for government accountability ant the plaintiff; ask this court to keep it that way in the interest of justice.

RESPECTFULLY SUBMITTED this 13th day of June, 2013.


Libby Haines-Marchel
Appellant



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

DRY CELL SEARCH AUTHORIZATION
AUTORIZACION PARA REGISTRO EN CELDA SECA

Offender Name / Nombre del interno o interna MARCHELL, BROCK		DOC Number / Núm. del DOC 788197
Living Unit / Unidad de vivienda C-Unit	Date of Placement / Fecha de la colocación 12/13/10	Time of Placement / Hora de la colocación 17:39

SECTION 1 / SECCION 1

Reasons for Placement:

Colocación debido a Suspicion of introduction of contraband into CBCC via the visit program

Reasonable Suspicion for Placement or Extension is as Follows:
Sospecha razonable por la colocación o extensión de tiempo es como sigue:

Confidential information

☒ I Approve Placement on Dry Cell Watch

Yo apruebo la colocación en celda seca

See reverse side
for offender
response.

☐ I Do Not Approve Placement on Dry Cell Watch

Yo NO apruebo la colocación en celda seca

Vea el dorso para la
respuesta del interno
o interna.

[Signature]

Superintendent/Designee / Superintendente/Designado

SECTION 2 - LIMITATIONS OF CONDITIONS OF CONFINEMENT /
SECCION 2 - LIMITACIONES DE CONDICIONES DE CONFINAMIENTO

Approved Changes to Condition of Confinement:

Cambios a las condiciones de confinamiento
aprobadas:

Superintendent/Designee / Superintendente/Designado

Date/Fecha

SECTION 3 - EXTENSION REQUEST / SECCION 3 - PETICION PARA UNA EXTENSION

☐ I Approve a 24 Hour Extension of Dry Cell Watch

Yo apruebo una extensión de 24 horas para la celda seca

☐ I Do Not Approve a 24 Hour Extension of Dry Cell Watch

Yo NO apruebo una extensión de 24 horas en celda seca.

Superintendent/Designee / Superintendente/Designado

FILED
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OF THE STATE OF WASHINGTON

STATION H
WASHINGTON

DEPUTY

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v.

WASHINGTON STATE
DEPARTMENT OF CORRECTIONS
Respondent.

COA. 43700-7-II

) Declaration of Mailing (DCLRM)

I, LIBBY HAINES-MARCHEL, declare that on June 13, 2013 I mailed a copy of APPELLANT REPLY BRIEF to Assistant Attorney General, Mikolaj T. Tempiski, P.O. Box 40116, Olympia, WA 98504-0116 by U.S. Mail.

I, LIBBY HAINES-MARCHEL, declare I delivered APPELLANT REPLY BRIEF to the Court Of Appeals Div. II.

Respectfully Submitted on this 13th day of June, 2013


LIBBY HAINES-MARCHEL